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No. 99-1389

Supreme Court, U.S.
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In The

Supreme Court of the United States

SALT RIVER VALLEY WATER USERS' ASSOCIATION and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioners,

versus

THE UNITED STATES, THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE, THE YAVAPAI-APACHE NATION, THE HOPI TRIBE, THE NAVAJO NATION, THE SAN JUAN SOUTHERN PAIUTE TRIBE, THE GILA RIVER INDIAN COMMUNITY, and SILAS KISTO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

I. THE DECISION OF THE ARIZONA SUPREME COURT IS SUBJECT TO REVIEW AT THIS TIME UNDER 28 U.S.C. § 1257(a)

A. Finality Is Determined Under a Pragmatic, Not Mechanical, Approach

This Court has rejected the notion that the finality requirement in 28 U.S.C. § 1257(a) should be administered in a "mechanical fashion" by precluding review where anything further remains to be determined by a state court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Instead, modern conceptions of finality follow a "pragmatic approach," *id.* at 487, that responds to "special needs." 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 4008 (2d ed. 1996). There "are now at least four categories" of cases in which a state court decision on a federal issue is final under 28 U.S.C. § 1257 despite anticipation of additional proceedings in courts below. *Cox Broadcasting*, 420 U.S. at 477.

B. The Decision At Issue Is Final Under the Second Category Identified in *Cox Broadcasting*

The decision by the Arizona Supreme Court that is the subject of the pending petition for a writ of certiorari falls within the second category identified in *Cox Broadcasting*. That category consists of cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting*, 420 U.S. at 480.

Respondents do not dispute that the question presented by the petition – whether federal reserved rights extend to nonappropriable groundwater – was finally

decided by the highest court in the State of Arizona in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (sometimes referred to in this reply as "*Gila River III*"). This Court's jurisdiction, therefore, depends upon survivability. We submit that because of the nature and importance of the question presented, it is virtually certain that the issue would survive additional proceedings in state court. Like other cases in the second *Cox Broadcasting* category, this is not a case in which the decision at issue may become moot or be superseded as a result of additional proceedings in lower courts. *See* 420 U.S. at 479.[1]

The Arizona Supreme Court's decision on Issue 4, if not reversed at this time, would require the Superior Court to make three principal determinations relating to claims to federal reserved rights to groundwater: (1) the purpose of each Indian reservation and other federal enclave located within the numerous watersheds covered by the pending general stream adjudications, (2) the amount of water necessary to accomplish that purpose, and (3) the extent, if any, to which waters other than groundwater are inadequate to fulfill the purpose of the particular reservation. App. A24, A30.[2] These determinations would be governed by federal law.

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[1] Similarly, as the Supreme Court of Arizona recognized, the question presented is a discrete legal issue that is ripe for decision. The issue would not be further illuminated by postponing review by this Court until after Arizona courts apply the principles adopted in *Gila River III*.

[2] In the decision below, the Arizona Supreme Court held that a reserved right to groundwater "may only be found where other waters are inadequate to accomplish the purpose of a reservation." App. A24. This limitation necessitates properly categorizing and quantifying each source of water available to a particular federal reservation. Contrary to assertions in the

There is no merit to the suggestion by some of the respondents that the question presented by the pending petition may disappear during future proceedings in state court. In the first place, the ruling of the Arizona Supreme Court on Issue 4 would be the linchpin for any determination on remand that a particular reservation has a federal reserved right to groundwater. The allegedly erroneous result in *Gila River III* would survive as the threshold legal issue in any future petition to this Court challenging an award of a reserved right to groundwater.

Second, as to all federal reserved rights claims that are defeated as a result of determinations on remand relating to the particular reservation's purpose, water sources, and dependence upon groundwater, the ruling in *Gila River III* would survive for future consideration by this Court. As recognized by the Apache Tribe respondents, claims to federal reserved rights to groundwater are based upon federal law and therefore any successful challenge to a particular reservation's claim to such a right could not be limited to state law grounds. Apache Opposition at 15. Unsuccessful claimants of federal reserved rights would petition this Court to review the federal issues that were resolved against them in the course of state court refusal to award a federal reserved right. In response, the prevailing parties on that particular claim would cross-petition on the threshold issue of

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Hopi Tribe's Brief in Opposition at 3-4, springs and "spring-fed ephemeral stretches of otherwise dry washes" are appropriable under Arizona law. *See* A.R.S. § 45-141; *England v. Ally Ong Hing*, 459 P.2d 498 (Ariz. 1969). Therefore, such sources will not be impacted by reversal of the Arizona Supreme Court's decision that the federal reserved rights doctrine applies to nonappropriable water.

whether the federal reserved rights doctrine extends to nonappropriable groundwater.

Predicting that this Court would be asked to review awards or rejections of reserved rights claims to Arizona groundwater is not speculative. The stakes are enormous, giving parties ample incentive to petition this Court to resolve claims based upon *Winters v. United States*, 207 U.S. 564 (1908). Our petition explained that the people of Arizona are dependent upon groundwater, which is the primary water supply in most areas of the state. SRP Petition at 16. Many users of groundwater have no practical, affordable alternative. *Id.*

Several other factors contribute to the importance of the ultimate resolution of the applicability of *Winters* to groundwater. Arizona's population is expected to continue to grow at one of the fastest rates in the nation. The rivers which are the subject of the pending adjudications in Arizona are already fully appropriated and are insufficient to satisfy all Indian claims, much less other existing uses. *See* SRP Petition at 7 n. 5; Response of State of Arizona at 2 n. 2. Awards of federal reserved rights to surface water will necessitate a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *United States v. New Mexico*, 438 U.S. 696, 705 (1978). As Indian reservations divert more surface water awarded to them, parties who suffer a corresponding reduction in availability of surface water will necessarily turn to increased pumping of groundwater.

The supply of groundwater in Arizona is also limited, however. Generally, groundwater withdrawals already exceed natural recharge to Arizona aquifers. SRP Petition at 16. Awarding *Winters* rights to Arizona groundwater would pose a direct and substantial threat to other landowners by sharply curtailing the quantity of

water available to meet their needs.[3] Similarly, the United States and Indian tribes, which are fervently contending that federal reserved rights to groundwater are essential to the long-term fulfillment of the purpose of Indian reservations and other federal enclaves, presumably would ask this Court to overturn any state court rejection or significant limitation of their *Winters* claims.[4]

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[3] As explained in SRP's petition, nearly three-fourths of Arizona is comprised of Indian reservations and other federal lands that are interspersed with state and private lands in an interlocking pattern overlying common aquifers. *See* SRP Petition at 17. Reserving specified quantities of groundwater for reservations would diminish the supply available to other lands sharing the same aquifer.

In its zeal to avoid review by this Court, respondent Gila River Indian Community ("GRIC") asserts that the decision below is limited to federal reservations that have no surface water rights and therefore will affect fewer than 20,000 people. Brief in Opposition at 20-21. GRIC's effort to belittle the impact of *Gila River III* is refuted by its own conduct. Although GRIC has historically received surface water flows and has filed a claim for more than 1,500,000 acre-feet of water, it is demanding, pursuant to the decision below on Issue 4, that the trial court immediately enjoin these petitioners and all other non-Indians from pumping that interferes with the water supply for the reservation, which borders the Phoenix area. *See* SRP Petition at 21 n. 17. Such an injunction would affect literally millions of people and businesses near the reservation.

[4] In the Big Horn adjudication, *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn I*"), *aff'd on other grounds by an equally divided Court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989), Indian tribes asked this Court to review the holding of the Supreme Court of Wyoming that the *Winters* doctrine does not extend to groundwater. *See* SRP Petition at 11 n. 9. The issue obviously was important to the Wyoming tribes even though, according to some of the respondents in the present case, the purposes of the Wind River Reservation "could be wholly

A determination that the decision in *Gila River III* is not final for purposes of 28 U.S.C. § 1257 would delay, most likely for many years, a definitive resolution of a critical issue of federal law that will directly control the future course of the Arizona adjudications, which have already been pending for more than twenty years. The additional state court proceedings required by *Gila River III* to determine reservation purposes, available water, and dependence upon groundwater will entail fact-intensive, time-consuming, very expensive inquiries on a reservation-by-reservation basis that undoubtedly will involve tens of thousands of historical documents and extensive work by experts. In short, the parties and the court system would be subjected to "long and complex litigation" relating to groundwater which would "all be for naught" (quoting *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963)) if the question presented has been decided incorrectly by the Arizona Supreme Court.

Although immediate reversal of *Gila River III* would not dispose of all federal questions in the adjudications, it would eliminate the entire group of issues that pertain to alleged *Winters* rights to groundwater. Moreover, while *Cox Broadcasting* noted that "in most, if not all, of the cases" in the second category the additional state court proceedings "would not require the decision of other federal questions that might also require review by the Court at a later date," 420 U.S. at 479, the Court stopped short of holding that finality is lacking unless all federal

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satisfied by available surface water" and therefore the state court's refusal to find a federal reserved right to groundwater supposedly was *dicta*. Brief of Hopi Tribe, et al., at 27. A refusal to apply *Winters* to a reservation in Arizona that is dependent in whole or in part upon groundwater would not be *dicta* and undoubtedly would be viewed by federal claimants as justifying petitioning this Court for a writ of certiorari.

issues have been decided by the state court. More recently, the Court accepted jurisdiction in *Wyoming v. United States* (the Big Horn adjudication) before the state court had addressed all federal issues presented by the case.[5]

As stated by leading commentators, "it is clear that appealability should no longer depend on formal completion of the entire judicial unit identified by a state as a single 'case'. . . . " Wright et al., *supra*, § 4009 at 168. Modern finality doctrine is marked by concepts of separability, identifying policies served by prompt review, and avoiding hardship. *See id.* at 165, § 4010 at 169. Deferring review by this Court of federal issues involved in the pending Arizona adjudications until all state court proceedings on such issues have been concluded would leave the parties in limbo for decades. *See In re the Rights to the Use of the Gila River*, 830 P.2d 442, 445 n. 2 (Ariz. 1992) (*"Gila River II"*). The absence of definitive resolution of important federal questions would subject the parties and the state court system to a grave risk that the final decree entered by Arizona courts will be infected with reversible error despite spending roughly forty years and millions of dollars in litigation. Such waste and delay are not mandated by this Court's pragmatic approach to determining finality of state court rulings on federal issues.

Finally, it should be noted that the pending petitions are likely to be only the first of a number of petitions that will be filed before a final comprehensive decree is

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[5] The Big Horn adjudication is being conducted in phases. *In re the General Adjudication of All Rights to Use Water in Big Horn River System*, 899 P.2d 848, 850 (Wyo. 1995) (*"Big Horn II"*). As of 1989 when this Court affirmed *Big Horn I*, not all federal issues had been resolved by the Wyoming Supreme Court. *See Big Horn II*.

entered in the pending adjudications in Arizona. Like the Big Horn case, the Arizona adjudications are being conducted in stages. Each of the federal enclaves, including more than twelve Indian reservations, involved in the Arizona adjudications is being treated as a separate contested case. The only federal reservation for which the Superior Court has established a schedule for adjudicating claims is the GRIC Reservation. Claims based upon state law are being litigated on a watershed-by-watershed basis. The Gila River adjudication alone has been divided into eight separate watersheds. It is anticipated that as proceedings in a watershed are completed, the Superior Court will enter a separate judgment containing the finality language authorized by Rule 54(b) of the Arizona Rules of Civil Procedure.[6] As such orders and decrees adjudicating individual watersheds are entered, the prudent course for parties desiring review by this Court will be to promptly petition for certiorari, thus avoiding any waiver.

C. Immediate Review Falls Within the Penumbral Area that Is Not Limited to the *Cox Broadcasting* Categories

Finality is not limited to cases falling within one of the categories enumerated in *Cox Broadcasting*. 22 James Wm. Moore et al., *Moore's Federal Practice* § 406.03[3][e][i] (3d ed. 2000). *Cox Broadcasting* noted that there are "at least four categories" of cases finding finality despite the

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[6] The segmented approach of the Arizona and Big Horn adjudications stands in stark contrast to the unitary proceeding in *Arizona v. California*, 373 U.S. 546 (1963), in which all of the water rights of federal reservations, including Indian tribes, were adjudicated at one time and set forth in a single decree.

fact that further proceedings in state court are anticipated. 420 U.S. at 477. The concept of finality has acquired a "penumbral area" that is not limited to formerly strict interpretations of this Court's jurisdiction under 28 U.S.C. § 1257. *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

A water rights adjudication "is a virtually unique type of proceeding" which in certain contexts justifies departure from "general propositions." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983).[7] A leading commentator suggests that multiparty and multiclaim cases "are better approached independently, outside the categories" described in *Cox Broadcasting*. Wright et al., *supra*, § 4010 at 197. Denial of immediate review by this Court may thwart state interests. *Id.* at 198. Comity concerns associated with immediate review by this Court are reduced by the fact that such review is consistent with the state system's resolution of the federal issue on an interlocutory basis. *Id.*

> If the state courts think it important to achieve an authoritative resolution of a controlling federal question for purposes of continuing proceedings that may prove lengthy and complex, the [Supreme] Court [of the United States] may properly cooperate by finding finality. Enabling state courts to proceed with confidence as to at least one federal issue is important enough to run some risks that future proceedings will bring the case back to the Court with different federal questions.

Id. at 199.

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[7] In *Nevada v. United States*, 463 U.S. 110 (1983), for instance, this Court recognized the need to create an exception, in water rights adjudications, to application of traditional principles of res judicata mutuality requirements. *Id.* at 143-144.

In providing a mechanism to review "the important legal decisions of the trial court as promptly as practicable at the outset of the adjudication," the Arizona Supreme Court explained that in a case of this magnitude "it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew." *Gila River II*, 830 P.2d at 445 n. 2. Modern finality principles "respond to genuine needs." Wright et al., *supra*, § 4010 at 201.

II. CONCLUSION

This Court has jurisdiction to immediately review the Arizona Supreme Court's decision on Issue 4. For the reasons stated in our petition, we respectfully ask the Court to reverse the decision below.

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